COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2013-SC-000367

COMMONWEALTH OF KENTUCKY **APPELLANT**

v. **APPEAL FROM LAWRENCE CIRCUIT COURT**
HON. JOHN DAVID PRESTON, JUDGE
COURT OF APPEALS FILE NUMBERS:
2011-CA-000956 AND 2011-CA-00957
INDICTMENT NO. 2010-CR-00111 AND 2010-CR-00113

MICHAEL YOUNG AND JANIE (CASTLE) YOUNG **APPELLEES**

BRIEF FOR APPELLEES, MICHAEL YOUNG AND JANIE (CASTLE) YOUNG)

Submitted by:

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CERTIFICATE REQUIRED BY CR 76.12(6):
The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the Hon. John David Preston, Judge, Judicial Center, 908 3rd Street, Suite 217, Paintsville, Kentucky 41240; the Hon. Anna D. Melvin, Commonwealth's Attorney, P.O. Box 596, Paintsville, Kentucky 41240-0596; the Hon. J. Christopher Bowlin, Osborne & Bowlin, P.O. Box 479, Paintsville, Kentucky 41240; and to be served by messenger mail to Hon. William Bryan Jones and Hon. Perry Thomas Ryan, Assistant Attorney Generals, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on August 28, 2014. The record on appeal was not checked out for purpose of this Brief.

Roy Durham

ROY A. DURHAM, II

INTRODUCTION

Appellees, Michael and Janie Young, entered conditional guilty pleas to Theft by Deception over $10,000. Mr. and Ms. Young were sentenced to a term of five (5) years probation pursuant to the plea agreement. On appeal, Appellees argued the single issue that the trial court erred by failing to dismiss the charge of theft by deception over $10,000. By majority To Be Published Opinion, the Court of Appeals reversed their convictions and held that there was no theft by deception or otherwise.

STATEMENT CONCERNING ORAL ARGUMENT

Appellees welcome oral argument if this court believes it would assist in rendering a fair and just opinion in this case.

STATEMENT REGARDING CITATIONS

The original record on appeal in this case included one (1) volume of record[1]. A motion to supplement was filed and one (1) additional C.D. was added to the record. For purposes of this brief, citations to the record are made using the following formats; "TR, p. _" for citations to the transcript of record and "CD #: date; time" for citations to the C.D. record.

[1] Michael and Janie Young filed a waiver of Joint Representation which was granted on 2/11/11. Therefore, their records are almost identical with the exception of page numbers being numbered differently. For simplicity, Appellee will cite to Michael Young's record and brief by default.

STATEMENT OF POINTS AND AUTHORITIES

COUNTER STATEMENT OF THE CASE

The Scholens entered into an agreement to adopt an unborn child from Michael and Janie Young. (TR p. 18). The Scholens had adopted the Young's daughter a year or so earlier with no problems. (TR p. 18, 22). After entering into the agreement, the Scholens started sending the Youngs money for prenatal care. (Id. at 18). Financial records provided by the Scholens showed they paid $6,002.99 to the Youngs through a Visa Bank Card. (TR p. 19). Mr. and Mrs. Scholen also paid $1,000 to Wave Towns, who represented the Youngs in the matter, and $974.00 to the firm of Claiborne, Outman & Surmay, P.C. who represented the Scholen Family in the adoption. (Id.).

Janie Young contacted Act of Love Adoptions in September, 2009, in reference to putting their unborn child up for adoption. (TR p. 21). On October 12, 2009, Act of Love Adoptions received the paperwork back from Mrs. Young wherein she told them the due date for the child was February 20, 2010, and that the child was a boy. (Id.). From October 22, 2009, through February 3, 2010, Act of Love Adoptions sent a total of $4,000 to Janie and Michael Young. (TR p. 21 – 22). On February 8, 2010, the agency documented that Mrs. Young mailed in Mr. Young's paperwork after she filled it out. Act of Love noted that they never had any contact with Mr. Young and documented that he was very uninvolved in the situation. (TR p. 22).

Janie Young left a total of nine messages for Mrs. Scholen. (TR p. 19). The first message was on February 24, 2010, wherein Mrs. Young indicated that she had made arrangements for a second couple to adopt their child and made several comments about repaying the money and allowing the Scholens to adopt the child. (Id.). In her fifth message, dated March 5, 2010, the date the baby was born, Mrs. Young indicated that she

had delivered a girl and that Michael did not want to give the child up for adoption, because they had three boys. (TR p. 20). Tracey Scholen contacted the Kentucky State Police on March 9, 2010. (TR p. 18). The Lawrence County Grand Jury returned separate indictments against both Michael and Janie Young, on December 10, 2010, under KRS § 514.040, Theft by Deception Over $10,000.00 and KRS § 532.080(3), the status offense of being a Persistent Felony Offender in the 1st Degree. The Grand Jury charged that on or before March 9th, 2010:

> Michael Young alone or in complicity with Janie Young committed the offense of Theft by Deception Over $10,000.00 by knowingly and unlawfully engaging in a scheme to defraud Tracy and Jeff Scholen of money in excess of $10,000.00, by placing their unborn child for adoption to the Scholen Family and receiving from the Scholen family money for the upkeep of the mother during her pregnancy, without disclosing that they had placed the child for adoption through a second agency to another couple.

On February 6, 2011, Appellees filed a Motion to Dismiss on grounds that the money that was received by the Youngs from the Scholen family amounted to a gift pursuant to KRS 199.590 (2). (TR p. 186). Appellees argued that any exchange of money that allegedly occurred that was not intended to be a gift would be an illegal transaction which the court could not enforce in a criminal case. (Id.).

Although, as found by the court, the Youngs were under no legal obligation to allow the Scholens to adopt the child, and the contribution of funds were gifts in the hope that something good might happen, the trial court denied the motion to dismiss. (TR p. 208 - 210; CD: 02/11/11; 11:23:00; 11:25:20). The trial court did state that "it may be that when we get into trial that it will just be apparent that there is not a criminal case or it

may have to go to a jury for the jury to determine the intent of the parties." (CD: 02/11/11: 11:25:20).

The trial court entered the following Order:

A. STIPULATED FACTS

The trial court made the following findings of stipulated facts:

1. At some point in the later part of 2009, Janie Young, had become pregnant with the child of her husband Michael Young.
2. Tracy and Jeff Schloan, [sic] paid the Defendants, Michael Young and Janie Young expense reimbursement money for the upkeep of Janie Young during her pregnancy in the anticipation that the Defendants would allow the Schloans [sic] to privately adopt the child once born.
3. Jeff and Tracy Schloan [sic] had previously adopted a child from Mr [sic] and Mrs. Young.
4. The Defendants had also been accepting expense money from the the [sic] Acts of Love Adoption Placement agency prior to accepting expense money from Tracy and Jeff Schloan [sic]. The Love Adoption Placement agency also provided the money with the anticipation that the Defendants would allow one of its parents to adopt the child through the agency.
5. The Defendants received amount in excess of $10,000.00 from both parties combined, but received less than $10,000 from each individual party.
6. The Defendants did not disclose to both the Schloan [sic] and the Love Adoption Placement agency that the Defendants were receiving expense money from the each of them at the same time. However, Janie Young did inform the Schloans [sic] that she had previously accepted money from the Love Adoption Placement agency and the two had discussed the Schloans [sic] paying it back.
7. If the fact that the Acts of Love Adoption Placement agency had been providing expense money to the Defendants at the same time as the Schoans [sic] had been disclosed to Tracy and Jeff Schloan [sic], the Schloans [sic] would have considered this a material issue and would not have provided any more expense money to the Defendants.
8. That the Defendants were under no legal obligation to allow either the Schloans [sic] or someone acting through the Act of Love Adoption Placement agency prospective parents to adopt the child in question.
9. The Act of Love Placement agency admitted that they cannot enforce any agreement entered into between the birth parents and the adopted parents to adopt a child.
10. The a [sic] Act of Love Adoption Placement agency admitted that any expenses paid on behalf of the birth parents were not in any way be

contingent upon Defendants decision to place their child up for adoption or to allow their child to be adopoted. [sic]

11. The Act of Love Adoption Placement agency never informed Michael and Janie Young that they could not except [sic] expenses from anyone else.
12. The Schloans [sic] never informed the Defendants that they could not except [sic] expenses from anyone else. It was not discussed.
13. The attorney interviewing Mike and Janie Young for the possibility of placing their child up for adoption [sic] the attorney for Act of Love Adoption Placement agency [sic] stated that she "did not feel it is a strong case. I don't sense an intentional scam, just no strong commitment either."
14. It is illegal to purchase a child for adoption and to pay money for the promise of being able to adopt a child.
15. Courts cannot enforce illegal contracts [sic]
16. The Defendants were under no legal obligation to allow the Schloans [sic] to adopt the child, and the Court had no ability to enforce or would have no ability to enforce any agreement between the parties as it relates to the adoption of the child.

B. CONCLUSIONS OF LAW

The trial court made the following conclusions of law:

> The Defendants filed a Motion to Dismiss that based on the above stipulated facts there was no crime committed under KRS 514.040. The Defendants argued that the alleged victims had no contractual rights to get the unborn child and could expect nothing in return for the money they were providing the Defendants. The Defendants also argued that they had no duty to disclose receiving expense money from two different sources. Thus, the alleged victims could not be cheated out of something that they had no right to receive under Kentucky law. In essence, the Defendants [sic] position was that any money that exchanged hands was a gift in the hope that something good would happen in the future – but that no contractual rights and no enforceable expectation could be created. Otherwise, a contract would have been formed for the sale of a child, which would be unenforceable.
>
> The Commonwealth argued that the intent to defraud and the act were complete prior to and independent of the birth of the child, and the issue of whether the Defendant had an obligation to follow through with the adoption was immaterial to the crime committed.
>
> After reviewing the stipulated facts and considering the arguments of both sides the Court comes to the following conclusions. The Defendants are correct in that the alleged victims could expect nothing in

> return for the money they were providing. In sum, any money provided by the prospective adoptive parents to the Defendant mother was a gift. However, the court OVERRULES the Defendants [sic] motion to Dismiss because the acts of the Defendants in failing to disclose materially relevant information concerning the prospective adoption was substantial and would in and of itself provide the prosecution under KRS 514.040.

(ORDER TR p. 208 – 210).

The Youngs entered into a conditional guilty plea reserving the right to appeal the denial of their Motion to Dismiss. (CD: 04/08/11; 09:48:45; TR p. 200). Michael and Janie Young were sentenced to five (5) years, probated for five (5) years. (CD: 05/13/11; 10:03:20; TR p.211-214). By agreement, the counts of Persistent Felony Offender in the 1st Degree against Michael and the PFO in the 2nd degree against Janie were dismissed. (Id.).

On appeal, Appellees argued that the trial court erred by failing to dismiss the charge of theft by Deception over $10,000. (Appellee's Brief p. 3). In support of that argument, Appellees argued that any exchange of money that occurred between the Scholens and the Youngs has to be viewed as a gift because pursuant to KRS § 199.590, any other view would be an illegal transaction. (Appellee's brief p. 7). In addition, Appellee's argued that the amount in question paid by the Scholens to the Youngs was less than $10,000.00, the essential element in the offense of KRS § 514.040 Theft by Deception Over $10,000.00. The amount the Scholens paid to the Youngs totaled $6,002.99, almost half the statutorily required $10,000.00. (Appellee's brief p. 9).

In a majority To Be Published Opinion, the Kentucky Court of Appeals reversed the Youngs' convictions and held, "We find no crime occurred and that the Appellant's motions to dismiss should have been granted." (Opinion p. 2). The Opinion concluded,

"(t)hat there was no theft by deception or otherwise." (Opinion p. 6). This Court granted the Appellant's Motion for Discretionary review on April 9, 2014.

Additional facts may be mentioned in the argument section below, as necessary.

ARGUMENTS

I.

THE KENTUCKY COURT OF APPEALS CORRECTLY HELD THAT THERE WAS NO THEFT BY DECEPTION OR OTHERWISE AND FOUND THAT THE TRIAL COURT ERRED BY FAILING TO DISMISS THE CHARGE OF THEFT BY DECEPTION OVER $10,000.

Appellant argues that the elements of theft by deception were present in this case and that the trial court did not err by refusing to dismiss the Youngs' case. (Appellant's brief p. 8). Appellant begins by stating:

> (T)here are limited instances when a trial judge may summarily dismiss a criminal indictment prior to trial. These instances "include the unconstitutionality of the criminal statute, prosecutorial misconduct that prejudices the defendant, a defect in the grand jury proceeding, an insufficiency on the face of the indictment, or a lack of jurisdiction by the court itself." Commonwealth v. Bishop, 245 S.W.3d 733, 735 (Ky. 2008).

First, Appellee would point out that this is an argument raised for the first time in this Court. This argument was not presented to the trial court or the Kentucky Court of Appeals and therefore is unpreserved. The Appellee cannot be permitted to feed one can of worms to the trial judge and another to the appellate court (or in this case, one can to the trial judge and the Court of Appeals and then another to this court). Neal v. Commonwealth, 95 S.W.3d 843, 848 (Ky. 2003) (Citing Kennedy v. Commonwealth,

544 S.W.2d 219, 222 (Ky. 1976)). This would allow the Appellant to have his cake and eat it too. Bixler v. Commonwealth, 204 S.W.3d 616, 633 (Ky. 2006).

Secondly, there was an insufficiency on the face of the indictment as it stated the Youngs engaged in a scheme to defraud Tracy and Jeff Scholen of money in excess of $10,000. As found by the trial court, the amount in question paid by the Scholens to the Youngs was less than $10,000.00, the essential element in the offense of KRS § 514.040 Theft by Deception **Over $10,000.00**. (Emphasis added). The amount the Scholens paid to the Youngs totaled $6,002.99, almost half the statutorily required $10,000.00. (TR p. 19). The stipulated facts found by the trial court states the "Defendants received amounts in excess of $10,000.00 from both parties combined, **but received less than $10,000 from each individual party.** (Order TR p. 208) (Emphasis added). The Youngs were indicted under the theory they schemed to defraud Tracy and Jeff Scholen of money in excess of $10,000. (Indictment TR p. 1). The Commonwealth stated:

> The Commonwealth's position is that this is a theft by deception, theft by fraud when this couple with the contract in place (Acts of Love) received expense money from one agency, goes to another couple (the Scholens) (sic), which they have adopted a child to earlier, one of their biological children too and entered into an agreement with the couple of the same nature.

(CD: 02/11/11; 11:22:20). Therefore, the alleged scheme was against the Scholens and only the monies paid by the Scholens factor into the elements of KRS § 514.040, i.e. the $6,002.99.

The evidence, findings of the Court and stipulation of facts show that the amount was only $6,002.99. (TR 19). Appellant tries to argue in its statement of the facts that the issue is abandoned because the Court of Appeals ruled the issue as moot when it

reversed the conviction and Appellees did not file motions for cross-discretionary review under CR 76.21. (Appellant's brief p. 3, footnote 2). However, the issue was always part of the single issue raised in the Kentucky Court of Appeals which was that the trial court erred by failing to dismiss the charge of theft by deception over $10,000. It was never singled out as a separate distinct issue by the Youngs. In fact, contrary to Appellant's footnote, it was discussed in Janie Young's response to the Motion for Discretionary Review that Michael Young joined. (MDR response p. 6).

Appellant argues that the motion to dismiss amounts to nothing less than an attack on the sufficiency of the evidence and that the Court of Appeals has less ability to assess the evidence which would have been admitted at trial. (Appellant's brief p. 9). This is not a sufficiency of the evidence argument. As found by the Court of Appeals, "no crime occurred." (Opinion p. 2). If the act is not criminal, than an indictment is void on its face.

Appellant next argues that the "record in this case shows that the elements of theft by deception were present and supported the guilty plea and conviction of the Youngs." (Appellant's brief p. 11). Appellant argues the Youngs obtained money by deception by representing to the Scholens that they could adopt their child while knowing full well that the child could not be adopted by both the Scholens as well as the Act of Love Adoptions. (Appellant's brief p. 11). This argument completely ignores the stipulated facts and findings by both the trial court and The Kentucky Court of Appeals that **the Youngs were under no obligation to allow anyone to adopt the child.** (Opinion p. 4.). The Youngs could allow the Scholens or Acts of Love Adoption to adopt their child as allowed by statute, or neither, and keep their baby. Appellant hangs its argument on the

fact that the Youngs did not disclose to both the Scholens and Act of Love Adoptions that they were receiving money from each of them at the same time. (Appellant's brief p. 12). The stipulated facts stated the neither the Scholens nor the agency told the Youngs they could not accept money from anyone else and the Kentucky Court of Appeals correctly held that the Scholens were never guaranteed to be able to adopt the Youngs' child and there is no law or agreement that required the Youngs to inform the Scholens of other adoptive parents they were considering and receiving money from. (Opinion p. 5 – 6).

The Appellant argues that the Youngs intended to deprive the Scholens and/or Act of Love Adoptions of the money received from them. (Appellant's brief p. 16). However, there is no evidence or inference that the Youngs were not going to give up their child. In fact, they had already given another child to the Scholens. The Youngs simply decided to keep their child which is allowed and actually encouraged by statute.

To find Theft by Deception in the case at bar would lead to an absurd result. This is especially true when all the parties and the trial court found that "the alleged victims could expect nothing in return for the money they were providing" and the Court of Appeals has found that the Youngs were under no legal duty to inform the Scholens of other potential adoptive parents they were considering and receiving money from. The law abhors an absurd result. Lincoln Court Realty Co. v. Kentucky Title Savings Bank & Trust Co., 169 Ky. 840, 185 S.W.156 (1916).

II.

THE ADOPTION STATUTE FOUND AT KRS 199.590(2) DOES CONTROL THE CASE.

KRS § 199.590(2) states in part "[a] person, agency, institution, or intermediary shall not sell or purchase or procure for sale or purchase any child for the purpose of adoption or any other purpose, including termination of parental rights." Therefore, any exchange of money that occurred between the Scholans and the Youngs has to be viewed as a gift because any other view would be an illegal transaction.

As the Youngs stated to the trial court, an individual cannot hide behind an "illegal contract nor can courts clothe with legality a contract that is absolutely illegal and void..." Tobacco By-Products & Chemical Corp. v. Western Dark Fire Tobacco, 280 Ky. 469, 133 S.W.2d 723, 726 (Ky. App. 1939). Therefore, any money that may have been exchanged which was not intended as a gift cannot be given any credence in a court of law. Otherwise, the court would be enforcing an illegal transaction in a criminal case, which violates both the Kentucky Constitution and the United States Constitution. Sections 2, 7, 11, and 27, Kentucky Constitution; 6th and 14th Amendments, U.S. Constitution.

"There is no doubt that KRS § 199.590 is intended to keep baby brokers from overwhelming an expectant mother or the parents of a child with financial inducements to part with the child." Surrogate Parenting Associates, Inc. v. Commonwealth, 704 S.W.2d 209, 211 (Ky. 1986). In the case at bar, money did exchange hands at a time when Mrs. Young intended to part with the child. However, as KRS § 199.590(2) clearly states, this

money can only be said to be a gift because to view it as remuneration for a contract would be illegal under KRS §199.590 and therefore unenforceable.

The trial court found "the Defendants were under no legal obligation to allow either the Scholens or someone acting through the Act of Love Adoption Placement agency prospective parents to adopt the child in question." (Order TR p. 209). Also, the trial court found "the Act of Love Adoption Placement agency admitted that they cannot enforce any agreement entered into between the birth parents and the adopted parents to adopt a child." (Id.). Finally the trial court found that "It is illegal to purchase a child for adoption and to pay money for the promise of being able to adopt a child," that "Courts cannot enforce illegal contracts," and that the "Defendants were under no legal obligation to allow the Schloans [sic] to adopt the child, and the Court had no ability to enforce or would have no ability to enforce any agreement between the parties as it relates to the adoption of the child." (Id.). Obviously this was only a gift in hopes that they would receive the child. Even the trial court stated "It's kind of a contribution of funds in the hopes of something good might happen." Unfortunately for the Scholens, the Youngs had three boys and decided to keep their newborn daughter and therefore the Scholens did not receive the child in the case at bar.

Furthermore, KRS § 199.590(6)(a) provides:

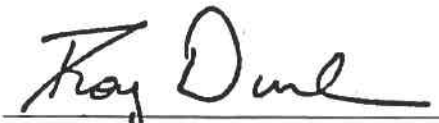
> In every adoption proceeding, the expenses paid, including but not limited to any fees for legal services, placement services, and expenses of the biological parent or parents, by the prospective adoptive parents for any purpose related to the adoption ***shall be submitted to the court, supported by an affidavit, setting forth in detail a listing of expenses for the court's approval or modification.*** (emphasis added).

No such submission was made in the present case. Because adoption is a statutory right, Kentucky courts require strict compliance with the statutory procedures to protect the rights of natural parents. Day v. Day, 937 S.W.2d 717, 719 (Ky. 1997), R.M. v. R.B., 281 S.W.3d 293 (Ky. App. 2009). The requirements of the statute were violated from the beginning and as such, dismissal of this action was warranted.

Conclusion

It is illegal to offer money under the guise of "purchasing a child." The law requires strict compliance with its statutes as it relates to expenses paid on behalf of the parent(s). The Youngs retained the right to not go through with the adoption and the money given to them was a gift. It has to be or it would be an illegal contract. To be convicted under KRS § 514.040, theft by deception over $10,000.00, the Youngs had to actually defraud the Scholens of at least $10,000.00. Rowland v. Commonwealth, 355 S.W.2d 292 (Ky. 1962). Mrs. Young had the right by statute to accept money for her care and retained the right to either place her child with the Scholens or with Acts of Love Adoption agency, or, as she finally chose, to keep her newborn daughter. The money given to Janie Young was a gift; to determine otherwise makes it a contract which is illegal under the statute and the Kentucky and United States Constitutions. Sections 2, 7, 11, and 27, Kentucky Constitution; 6th and 14th Amendments, U.S. Constitution. For the above mentioned reasons, Michael and Janie Young requests this Court to affirm the Kentucky Court of Appeals which vacated the convictions of Michael and Janie Young and to grant them any and all relief to which they are entitled.

Respectfully submitted,



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